Supreme Court, U.S.
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No. 92-165

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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BOBBY RUSSELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule was properly applied where the magistrate who issued the search warrant inadvertently failed to attach to the warrant a list of the items to be seized.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-16) is reported at 960 F.2d 421. One of the opinions of the district court is reported at 649 F. Supp. 1402.

### JURISDICTION

The judgment of the court of appeals was entered on April 28, 1992. A petition for rehearing was denied on May 28, 1992. The petition for a writ of certiorari was filed on July 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Pursuant to a plea agreement in which he reserved the right to appeal the denial of his motion to suppress evidence, petitioner was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of using a false social security number, in violation of 42 U.S.C. 408(g)(2); and two counts of making a false tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to ten years' imprisonment and ordered to pay a $200,000 fine. The court of appeals affirmed.

1. After petitioner was indicted in the United States District Court for the Northern District of Mississippi, he filed a motion to suppress evidence seized in a warrant-authorized search of his office and residence. The motion alleged that the warrant was facially defective because it failed to include an attachment describing the items to be seized.

After a hearing, the district court denied petitioner's motion to suppress. 649 F. Supp. 1402 (N.D. Miss. 1986); Pet. App. 10. The evidence at the suppression hearing showed the following: On August 20, 1986, Internal Revenue Service Special Agent James Baker applied for a search warrant before a United States magistrate. Baker's affidavit in support of his application for a search warrant included a list of the particular documents and items to be seized. There was insufficient space on the face of the warrant form to include the list of items to be seized, so the list was intended to be appended as an attachment to the warrant. Pet. App. 11 n.4.

When Baker applied for the warrant, he presented the complete application to the magistrate. The magistrate questioned Baker specifically about the list of items to be seized. On the basis of Baker's

affidavit, the magistrate found probable cause, and he authorized the search warrant. Pet. App. 11; 649 F. Supp. at 1404. The magistrate signed the warrant and gave Baker the relevant documents to be served on petitioner when the warrant was executed. Gov't C.A. Br. 5-6. As a result of an apparent oversight on the part of the magistrate's staff, however, the list of items to be seized was not attached to the warrant. Pet. App. 11 n.4.

Baker conducted the search the following day. During the search, Baker posted a copy of the list of items to be seized, and a computerized inventory was made of all items actually seized. Pet. App. 11-12. At the conclusion of the search, Baker served petitioner with a copy of the warrant—without the attachment specifying the items to be seized—and a copy of the inventory of seized items. *Id.* at 12. At that time, Baker realized that the attachment was missing, but he assumed that it had been omitted from petitioner's copy of the warrant because the magistrate had earlier ordered the file in the case sealed. Gov't C.A. Br. 8-9. Baker believed that the warrant was valid so long as the copy of the warrant in the magistrate's file included the attachment specifying the items to be seized. *Ibid.*

On the basis of those facts, the district court found that both the magistrate and Baker understood the search to be limited to those items specified in Baker's affidavit, even though the warrant did not incorporate the affidavit by reference and did not include the attachment specifying the items to be seized. 649 F. Supp. at 1404, 1407. The court also found that Baker "sought and executed the warrant in good faith," and that "his actions were objectively reasonable in executing the warrant authorized by the United States magistrate." *Id.* at 1408. Ac-

cordingly, the court held that the good-faith exception to the exclusionary rule applied in this case and rendered the seized evidence admissible. *Id.* at 1407 (citing *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984)).

2. Petitioner then filed a supplemental motion to suppress, relying on an affidavit from Internal Revenue Service Special Agent William Gibson. Gibson's affidavit stated that he met with Baker on the night before the search and was shown a copy of the search warrant. Gibson stated that he told Baker that the warrant did not contain a list of items to be seized. Pet. App. 12 n.6.

The district court rejected petitioner's supplemental motion. The court found that there was nothing in the record, including Gibson's affidavit, to indicate that Baker acted other than in good faith. Pet. App. 12 n.6.

3. The court of appeals affirmed. Pet. App. 9-16. Noting that the parties agreed that the warrant was defective, the court turned to the question whether the good-faith exception to the exclusionary rule was applicable on the facts of this case. *Id.* at 13. The court explained that "the exclusionary rule should not be applied to suppress evidence if the evidence was obtained by officers acting in objectively reasonable reliance on a subsequently invalidated search warrant." *Id.* at 13-14 (citing *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984)). Analogizing this case to *Sheppard*, in which the Court declined to suppress evidence where "the judge, and not the police officers, * * * made the critical mistake," the court of appeals stated that "[i]n this case, we likewise see nothing to be gained by laying fault for this apparent clerical error at Baker's feet." Pet. App. 14-15.

The court of appeals specifically rejected petitioner's claim that Gibson's affidavit evidenced a lack of good faith on Baker's part. Observing that "the facts show that Baker understood that the search and seizure was limited to the premises and items listed in the affidavit, and that the scope of the intended search and seizure was not exceeded," the court concluded that the Gibson affidavit did not render clearly erroneous the district court's finding that Baker acted in good faith. Pet. App. 12 n.6.

The court also rejected petitioner's claim that Baker's reliance on the warrant was not objectively reasonable. Pet. App. 15-16. The court pointed to ample evidence in the record supporting the district court's finding that Baker acted in good faith, including the facts that (1) Baker's affidavit demonstrated probable cause and described the premises to be searched and the items to be seized; (2) neither Baker nor the magistrate realized that the list of items to be seized was missing from the warrant as finally assembled; and (3) Baker and the magistrate were aware of the limitations on the items to be seized and acted accordingly. *Id.* at 15 n.10. Therefore, the court concluded that the good-faith exception to the exclusionary rule was applicable. *Id.* at 16.

## ARGUMENT

1. Petitioner contends (Pet. 4-7) that the courts below erred in concluding that the good-faith exception to the exclusionary rule governs this case. He asserts that the exception is inapplicable because the search warrant was facially deficient in that it failed to particularize the items to be seized. He further argues that Agent Baker failed to take reasonable steps to determine the validity of the warrant.

Petitioner's fact-bound claim does not warrant further review.

The court of appeals correctly sustained the district court's finding that Agent Baker acted in good faith in obtaining and executing the warrant. The seized evidence was therefore properly held admissible under this Court's decisions in *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). In *Leon*, this Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," particularly when "an officer acting with objective good faith has obtained a search warrant from a judge or a magistrate and acted within its scope." 468 U.S. at 919, 920. In such circumstances, the deterrent value of the exclusionary rule is vitiated by the fact that "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 921.

In *Massachusetts* v. *Sheppard*, the Court applied the good-faith exception to a search warrant that, like the warrant at issue in this case, insufficiently described the items to be seized. In *Sheppard*, the warrant incorrectly identified the items to be seized as evidence of narcotics possession or use, when in fact the items at issue were evidence of a murder. 468 U.S. at 986 & n.2. Relying on *Leon*, this Court reversed the suppression of the seized evidence, because the Court "refuse[d] to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Id.* at 989-990.

The same considerations that prompted this Court to apply the good-faith exception in *Leon* and

*Sheppard* are present here. The record in this case is replete with evidence supporting the findings of both courts below that Agent Baker obtained and executed the warrant in good faith. Baker prepared an extensive affidavit that demonstrated probable cause and described with particularity the premises to be searched and the items to be seized. The magistrate found probable cause to justify the search and approved the description of the property to be seized. At the outset of the search Baker posted a copy of the list of items to be seized, and at the completion of the search he provided petitioner with a computerized list of all the items that had been seized. Most importantly, Baker confined the scope of the search to the parameters of the affidavit. Thus, contrary to petitioner's contention, Baker "took every step that could reasonably be expected of [him]." *Sheppard*, 468 U.S. at 989; see *United States* v. *Anderson*, 851 F.2d 384, 388-389 (D.C. Cir. 1988), cert. denied, 488 U.S. 1012 (1989); *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990).

As the courts below concluded, the warrant in this case was defective simply because the magistrate's staff failed to attach to the warrant form the list of items to be seized, even though the list had previously been prepared by the executing agent. Since "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges," *Sheppard*, 468 U.S. at 990, such a clerical error does not require exclusion of the seized evidence. *Id.* at 991.[1]

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[1] Petitioner points to Agent Gibson's affidavit indicating that, prior to conducting the search, Baker knew that the list of items to be seized was missing from the warrant. Pet. 5. Baker, however, was under the impression that the list of items

2. Petitioner contends (Pet. 5-7) that the decision below is in conflict with the decisions of the First, Ninth, and Tenth Circuits in *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747, 750 (9th Cir. 1989); *United States* v. *Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988); *United States* v. *Fuccillo*, 808 F.2d 173, 178 (1st Cir.), cert. denied, 482 U.S. 905 (1987); *United States* v. *Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986); and *United States* v. *Crozier*, 777 F.2d 1376, 1382 (9th Cir. 1985). That contention is incorrect.

In each of the cases cited by petitioner, the courts of appeals refused to apply the good-faith exception when police officers relied on search warrants later found to be impermissibly overbroad. Those courts found that the search warrants were so facially deficient in failing to particularize the things to be seized that the executing officer could not reasonably have presumed that the warrants were valid. Cf. *Leon*, 468 U.S. at 923. In this case, by contrast, the warrant was not so facially deficient as to make it unreasonable for Agent Baker to presume that the warrant was valid. The proposed warrant form referenced an attachment listing the items to be seized, and Baker included the referenced attachment when he presented the warrant application to the magistrate. The courts below found as a matter of fact that neither the magistrate nor Baker realized that the list of items to be seized was not attached to the warrant as finally assembled and filed.

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to be seized was not required to be attached to the version of the warrant served on petitioner so long as it was attached to the warrant in the magistrate's sealed file, and he believed that the filed copy of the warrant contained an attached list of the items to be seized. Gov't C.A. Br. 25-26.

When Baker discovered that the list was not attached to the warrant forms in his possession, he assumed that the magistrate's office had not provided him with the list because the magistrate had sealed the file. Underlying that assumption was his reasonable (though mistaken) belief that the attachment was affixed to the version of the warrant in the magistrate's file. Accordingly, the cases cited by petitioner are inapposite, because in none of those cases did the officers executing the warrant have reason to believe that the requisite particularized list of items to be seized was in fact attached to the warrant. Petitioner has failed to demonstrate that any other court of appeals would reach a different result on the unusual facts of this case. Accordingly, no further review is warranted.[2]

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[2] Petitioner errs in contending (Pet. 6) that the Ninth Circuit would have decided this case differently under the authority of *Center Art Galleries-Hawaii, Inc.* v. *United States*, *supra*. Petitioner points to language in *Center Art* indicating that an affidavit cannot cure the overbreadth of a warrant unless the affidavit is attached to and incorporated by reference in the warrant, 875 F.2d at 750, but that language is inapposite. In this case, the lower courts did not rely on Baker's unattached affidavit to cure the overbreadth of the warrant; rather, they looked to the affidavit as further evidence of Baker's good faith. See *United States* v. *Luk*, 859 F.2d 667, 677 (9th Cir. 1988) ("although the [unincorporated] affidavit cannot be used to cure the warrant's overbreadth, the possession of the affidavit when the officers conduct their search * * * is evidence of good faith under *Leon*"); see also *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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